Office of the United States Trustee
33 Whitehall Street
New York, New York 10004
212 510 0500
John Robert Byrnes, Esq.
Mary Elizabeth Tom, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____/

In re:

WORLDCOM, INC., et al.

Debtors.

_____/

Chapter 11 Cases
Cases No. 02-13533(AJG)

NOTICE OF MOTION AND HEARING ON MOTION OF THE UNITED STATES TRUSTEE FOR THE APPOINTMENT OF AN EXAMINER

PLEASE TAKE NOTICE that on July 22, 2002 the United States Trustee filed a motion for the appointment of an Examiner pursuant to the provisions of 11 U.S.C. § 1104 (c)(2) together with a proposed order granting the relief requested. The Debtors do not object to the motion or the form of the proposed order.

The United States Trustee intends to bring on the motion for hearing in conjunction with the first day orders requested by the Debtors before the United States Bankruptcy Court, Alexander Hamilton Customs House, One Bowling Green, New York, New York, 10004, on Monday, July 22, 2002 at a time to be set by the Court.

The motion of the United States Trustee basically alleges that the Debtors fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000. The Debtors acknowledge that their bond debt alone, all of which is unsecured, exceeds $25,000,000,000. The proposed relief requires that the Examiner submit the report required by law within 90 days of appointment. The proposed order further requires the Debtors to fully cooperate with the Examiner and authorizes the Examiner to insure that all records of the Debtors are maintained.

A copy of the Motion and proposed order may be obtained by contacting the office of the United States Trustee at 212 510 0500 or by accessing the Court web site.

YOUR RIGHTS MAY BE AFFECTED. You should consult with an attorney if you have questions regarding your rights in the matters referred to above. If you fail to appear at the hearing on the motion, the Court may assume that you do not object to the relief requested and the relief may be granted.

Dated: July 22, 2002

/s/ John Robert Byrnes
John Robert Byrnes
Attorney for the United States Trustee

Office of the United States Trustee
33 Whitehall Street
New York, New York, 10004
212 510 0500
John Robert Byrnes, Esq.
Mary Elizabeth Tom, Esq.

Office of the United States Trustee
33 Whitehall Street
New York, New York, 10004
212 510 0500
John Robert Byrnes, Esq.
Mary Elizabeth Tom, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____/

In re:

WORLDCOM, INC., et al.

Chapter 11 Cases
Cases No. 02-13533(AJG)

Debtors.

_____/

MOTION OF THE UNITED STATES TRUSTEE FOR THE APPOINTMENT OF AN EXAMINER

The United States Trustee, through the undersigned counsel, moves this Court for entry of an order directing the appointment of an examiner pursuant to 11 U.S.C. § 1104(c). The United States Trustee notes that at the time of filing of this Motion, the Court had obviously not yet ruled on the Debtors' Motion for Administrative Consolidation of its cases. For the sake of clarification, the United States Trustee is seeking the appointment of one examiner with the authority to conduct an appropriate investigation into the affairs of all of the Debtors subject to the terms of the proposed attached to this motion. The Debtors do not object to either the motion or entry of the proposed Order.

BACKGROUND

1. WorldCom, Inc. is a publicly held, Georgia corporation which provides a broad range of communications services. On June 25, 2002, WorldCom, Inc. confirmed that its financial statements over a fifteen month period improperly stated certain line costs (i.e., monies paid to other communications companies to use their networks) as capital investments, in the approximate amount of $3.8 billion. WorldCom, Inc. has also acknowledged that there are material deficiencies in earlier financial statements for 1999 and 2000.

2. On June 27, 2002, the Securities and Exchange Commission commenced a civil fraud action in the United States District Court for the Southern District of New York. The complaint charges WorldCom, Inc. with violating various provisions of the federal securities laws, and seeks court orders imposing permanent injunctive relief as well civil monetary penalties and the appointment of a corporate monitor.

3. On June 28, 2002, the Honorable Jed S. Rakoff entered a ruling in that action providing for the appointment of a corporate monitor for WorldCom, Inc. in the SEC Action (the "corporate monitor"), based in part on a joint agreement of the Securities and Exchange Commission and WorldCom, Inc. The District Court directed WorldCom, Inc. and its affiliates to preserve all materials relating to WorldCom, Inc.'s financial reporting, disclosures and accounting matters. The corporate monitor was provided with oversight responsibility with respect to all compensation paid by WorldCom, Inc. and responsibility for preventing unjust enrichment from the type of conduct alleged in the SEC's

complaint. The Court also directed WorldCom, Inc. to cooperate with the Corporate Monitor and make its books, records and accounts available to him.

4. On July 21, 2002, WorldCom Inc. and over 170 of its subsidiaries and related businesses (hereinafter the "Debtors") filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code.

GROUNDS FOR THE APPOINTMENT OF AN EXAMINER

5. Section 1104(c) of the Bankruptcy Code provides as follows:

> If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an Examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if –
>
> (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
>
> (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

6. Where the circumstances set forth in Section 1104(c)(2) are present, the plain language of the statute requires the appointment of an Examiner. *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500-01 (6th Cir. 1990), *accord In re Mechem Financial of Ohio, Inc.* 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988) (dicta); *In re The Bible Speaks*, 74 B.R. 511, 514 (Bankr. D. Mass. 1987); *In re 1243 20th Street, Inc.*, 6

B.R. 683, 685, n.3 (Bankr. D.D.C. 1980) (dicta); *In re Lenihan*, 4 B.R. 209, 211 (Bankr. D.R.I. 1980) (dicta); *see generally Collier on Bankruptcy* ¶ 1104.03[2]. A few courts have declined to appoint an Examiner under Section 1104(c)(2) in extraordinary situations which are not present in the instant case, notably where the appointment is sought late in the case. *In re Bradlees Stores, Inc.*, 209 B.R. 36, 38 (Bankr. S.D.N.Y. 1997) (Lifland, J.) (court need not address the issue of whether appointment is mandatory because movants had waived the right to seek such relief).

7. No trustee has been appointed in the instant bankruptcy case, and no plan has been confirmed.

8. The combined Debtors' fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, far exceed $5 million. As of filing, the Debtor and its subsidiaries had unsecured bank debt in excess of two billion dollars. In addition, bondholders hold approximately $26 billion in additional unsecured debt. See Affidavit of Susan Mayer Pursuant to Local Bankruptcy Rule 1007-2, pp12-13.

9. The uncontroverted facts mandate the appointment of an Examiner under 11 U.S.C. § 1104(c)(2).

10. The United States Trustee further requests that any Examiner appointed in the instant case have the powers and duties set forth in the proposed order filed with this motion. The Debtors do not object to the motion or the form of the attached order. Among other things, the proposed order specifically sets a short time limit for the Examiner to complete the investigation and report (subject to the right to request an

extension), requires the Examiner to cooperate with other investigations to avoid duplication, and allows any party to request modification of the Examiner's powers or any other lawful relief.

WHEREFORE, the United States Trustee moves this Court to enter an order directing the appointment of an Examiner pursuant to 11 U.S.C. § 1112(c)(2) and requests such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/ John Robert Byrnes
John Robert Byrnes
Attorney for the United States Trustee

Office of the United States Trustee
33 Whitehall Street
New York, New York 10004
212 510 0500
John Robert Byrnes, Esq.
Mary Elizabeth Tom, Esq.

Office of the United States Trustee
33 Whitehall Street
New York, New York 10004
212 510 0500
John Robert Byrnes, Esq.
Mary Elizabeth Tom, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____/

In re:

WORLDCOM, INC., et al.

Debtors.

_____/

Chapter 11 Cases
Cases No. 02-13533(AJG)

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF UNITED STATES TRUSTEE FOR APPOINTMENT OF EXAMINER

INTRODUCTION

The United States Trustee ("U.S. Trustee") submits this memorandum of law in support of the U.S. Trustee's Motion to Appoint Examiner. In the instant case, the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000. Pursuant to 11 U.S.C. § 1104(c)(2), the Court is required to appoint an examiner in this Chapter 11 case on request of the U.S. Trustee or other party in interest, where such debts exceed that amount. The mandatory appointment of an examiner in this case is supported by the express language of § 1104(c)(2), applicable case law, and legislative history.

STATEMENT OF FACTS

The Debtors fully acknowledge that their bond debt alone is approximately $28 billion. Their outstanding unsecured bank debt at the time of filing exceeds $2 billion. See Affidavit of Susan Mayer Pursuant to Local Bankruptcy Rule 1007-2, pp.12-15. These amounts vastly exceed the statutory mandate for the appointment of an examiner. The Court does, however, have discretion with regard to limiting or expanding the powers of the examiner.
The proposed order sets out several straightforward additional terms relating to the appointment. The following comments describe the relevant modifications.

The Examiner is directed to focus the investigation on allegations of misconduct and mismanagement. The debtor believes that other matters relating to the operation of the Debtors' business and the reorganization will be fully investigated by the creditors whose financial interests are at stake. The Examiner is authorized to oversee the affairs of the Debtors in order to insure preservation of all relevant books and records. The Debtors are required to fully cooperate with the Examiner. The Examiner is directed to refrain from public comment until the report of Examiner is filed with the Court. The Examiner is required to file the report within 90 days of appointment unless such time is expanded by order of the Court.

These conditions balance the desire of the public for full transparency of the Debtors' conduct with the Debtors desire to reorganize their business affairs expeditiously without incurring unnecessary duplication of administrative expenses.

ARGUMENT

APPOINTMENT OF EXAMINER UNDER 11 U.S.C. § 1104(c)(2) IS MANDATORY

Title 11 U.S.C. § 1104 provides for the appointment of a trustee or examiner in a Chapter 11 bankruptcy case. Section 1104(c) provides as follows:

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management in the affairs of the debtor of or by current or former management of the debtor, if--

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c).[1]

Threshold Issues

Section 1104(c) authorizes the appointment of an examiner at any time before the confirmation of a plan, on request of a party in interest or the U.S. Trustee, after notice and a hearing, "if the court does not order the appointment of a trustee". The statute expressly provides that the court cannot appoint an examiner if a trustee is appointed. This limitation was not intended to require the denial of a motion to appoint a trustee as a precondition to the appointment of an examiner. See Keene Corp. v. Coleman (In re Keene Corp.), 164 B.R. 844, 855 (Bankr. S.D. N.Y. 1994). In Keene, the court rejected the creditors' committee's argument that the court could not appoint an examiner unless it first refused to appoint a trustee, holding that "[a] motion to appoint an examiner stands on its own, and need not be part of an

---

[1] This section was originally codified as 11 U.S.C. § 1104(b). Subsections (b) and (c) of § 1104 were redesignated as subsections (c) and (d) by the Bankruptcy Reform Act of 1994, which added a new subsection (b), authorizing trustee elections in Chapter 11 cases. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (enacted October 22, 1994, and effective in cases filed after that date).3

unsuccessful motion to appoint the trustee." Id. The court further stated:

> ... the argument finds no support in the statutory language. Section 1104 (b) [now 1104(c)] states, in substance, that the Court can appoint an examiner, under the appropriate circumstances, if it does not order the appointment of a trustee under subsection 1104(a). This is a limitation, not a requirement; and it means just what it says: if the Court has appointed a trustee, the Court cannot also appoint an examiner. This makes sense since the trustee's investigative powers are at least as great as an examiner's. [Citation omitted.] It does not mean, as the Committee suggests, that the Court must first refuse to appoint a trustee before it can direct the appointment of an examiner.[2]

Id.; see also In re Gilman Services, Inc., 46 B.R. 322, 327 (Bankr. D. Mass. 1985) (court granted U.S. Trustee's motion to appoint examiner, where no separate motion to appoint a trustee had been filed). Similarly, in a number of cases, bankruptcy courts have appointed an examiner sua sponte, where no motion to appoint a trustee had been filed. See In re First American Health Care of Georgia, Inc., 208 B.R. 992, 994 (Bankr. S.D. Ga. 1996); In re Public Service Company of New Hampshire, 99 B.R. 177, 182 (Bankr. D. N.H. 1989); In re Jartran, Inc., 78 B.R. 524, 527 (Bankr. N.D. Ill. 1987); In re UNR Industries, Inc., 72 B.R. 789, 795 (Bankr. N.D. Ill. 1987); In re Landscaping Services, Inc., 39 B.R. 588, 590-591 (Bankr. E.D. N.C. 1984).

Revco and Other Applicable Case Law

The only reported U.S. Court of Appeals decision to squarely address the issue whether the appointment of an examiner under § 1104(c)(2) is mandatory, as opposed to discretionary, is

---

[2] The court's reading of the statute is consistent with Chapter X of the former Bankruptcy Act, which did not contemplate the appointment of both a trustee and an examiner in the same proceeding. See Bankruptcy Act of 1998, § 168, 11 U.S.C. § 568 (1976) (repealed 1978); former Bankruptcy Rule 10-208(b); In re Philadelphia & Reading Coal & Iron Co., 105 F.2d 354, 355 (3d Cir. 1939); accord, Vendramis v. Sword S.S. Line, Inc., 116 F.2d 669 (2d Cir. 1940).

Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.), 898 F.2d 498 (6th Cir. 1990). In Revco, the U.S. Trustee filed a motion to appoint an examiner for the debtors, owners of a nationwide chain of drug stores acquired in a leveraged buyout, to conduct an investigation of the leveraged buyout, less than two months after the filing of the debtors' Chapter 11 cases. As the parties stipulated that each of the debtors' fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceeded $5,000,000, the U.S. Trustee contended that the bankruptcy court was required pursuant to § 1104(b)(2) (now § 1104(c)(2)) to appoint an examiner at the U.S. Trustee's request. The bankruptcy court denied the U.S. Trustee's motion as premature and unnecessary,[3] specifically rejecting the U.S. Trustee's contention that the appointment of an examiner was mandatory under the circumstances. Id. at 499. The U.S. Trustee appealed to the district court, and the district court dismissed the appeal, holding that the U.S. Trustee lacked standing to appeal because the bankruptcy court's decision had not affected the U.S. Trustee's pecuniary interest. Id. On appeal from the district court, the U.S. Court of Appeals for the Sixth Circuit reversed the decisions of the district court and the bankruptcy court and remanded the case to the bankruptcy court with instructions to order the appointment of an examiner under § 1104(b)(2) (now § 1104(c)(2)). Id. at 501. In so doing, the Sixth Circuit held that the appointment of an examiner is mandatory under that section, based upon the plain meaning of the statute.[4] Id. at 500-501. Noting the difference between subsection (b)(1) (now (c)(1)), which is discretionary, and subsection (b)(2) (now (c)(2)), which is mandatory, the court further stated as follows:

---

[3] The bankruptcy court also denied as premature the trade creditors' committee's request to employ a private accounting firm to investigate the leveraged buyout on its behalf. Subsequently, the court approved the committee's request when it renewed its motion several months later. 898 F.2d at 499.

[4] The Sixth Circuit also held that the U.S. Trustee had standing to appeal the bankruptcy Court's order denying the U.S. Trustee's motion to appoint an examiner. Id. at 499-500

> Section 1104(b)(1), which governs the appointment of an examiner when the total unsecured debt is less than $5 million, follows the language of § 1104(a) [relating to the appointment of a trustee]; in both cases the appointment is left to the bankruptcy court's discretion. The contrast with § 1104(b)(2) could not be more striking. When the total "fixed, liquidated, unsecured" debt is greater than $5 million, the statute requires the court to appoint an examiner. [Citation omitted.] Unless § 1104(b)(2) requires the appointment of an examiner in such a case, it becomes indistinguishable from § 1104(b)(1).

Id. at 501. In addition, the court addressed the debtors' concerns that the mandatory construction of the statute may invite abuse, and that a party in interest could needlessly prolong a case with last-minute demands for an examiner, noting that the bankruptcy court retains broad discretion to direct the examiner's investigation, including its nature, extent, and duration. Id.; see 11 U.S.C. § 1104(c) ("the court shall order the examiner to conduct such an investigation of the debtor as is appropriate").

The majority of the other courts addressing this issue have recognized the mandatory nature of examiner appointments under § 1104(c)(2). See In re Schepps Food Stores, Inc., 148 B.R. 27, 30 (S.D. Tex. 1992) (mandatory, but creditor waived right to appointment of examiner by failing to make request until eve of confirmation hearing); In re Big Rivers Electric Corp., 213 B.R. 962, 965-966 (Bankr. W.D. Ky. 1997) (appointment of examiner was required as a matter of law); In re Mechem Financial Of Ohio, Inc., 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988) (mandatory); In re The Bible Speaks, 74 B.R. 511, 514 (Bankr. D. Mass. 1987) (appointment of examiner is required if trustee is not appointed, but court appointed trustee); In re Tyler, 18 B.R. 574, 578-579 (Bankr. S.D. Fla. 1982) (appointment of examiner not mandated because moving party failed to establish that debtor's unsecured debts exceeded $5,000,000); In re 1243 20th Street, Inc., 6 B.R. 683, 685 n.3 (Bankr. D. D.C. 1980) (mandatory); In re Lenihan, 4 B.R. 209, 211 (Bankr. D. R.I. 1980) (mandatory); see also In re Bradlees Stores, Inc., 209 B.R. 36, 38

(Bankr. S.D. N.Y. 1997) (creditors waived right to appointment of examiner to investigate claims arising from leveraged buyout by failing to make request until approximately two years after cases were filed and eight months after issuance of report on same matter by debtors' professionals following a 13-month investigation); In re Keene Corp., 164 B.R. at 855 ($5,000,000 debt requirement not met); but see In re Rutenberg, 158 B.R. 230, 233 (Bankr. M.D. Fla. 1993) (court denied motion for appointment of examiner filed by individual debtor no longer engaged in business, where plan and disclosure statement had been filed and such appointment would cause further delay in the administration of case); In re GHR Companies, Inc., 43 B.R. 165, 176 (Bankr. 1984) (court denied motion for appointment of examiner in view of pending motions to appoint a trustee and to change venue and where debtors were not public companies); In re Shelter Resources Corp., 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (court denied motion to appoint examiner to investigate allegations made in shareholders' derivative action and to review fairness of any settlement of action, where such investigation was rendered moot by approval of settlement).[5]

Unambiguous Plain Language of § 1104(c)(2) Is Mandatory

In Revco, in determining that the appointment of an examiner under § 1104(b)(2) (now § 1104(c)(2)) is mandatory, the court based its holding on the plain meaning of the statute itself. See Revco, 898 F.2d at 500; see also Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). Thus, the court stated:

> The provision plainly means that the bankruptcy court "shall" order the

---

[5] The bankruptcy court's ruling in Shelter Resources was effectively overruled by the Sixth Circuit's subsequent decision in Revco. See Keene, 164 B.R. at 856 n.9.

> appointment of an examiner when the total fixed, liquidated, unsecured debt exceeds $5 million, if the U.S. trustee requests one. [Footnote omitted.] Black's defines "shall" as follows: "As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common and ordinary parlance ... the term 'shall' is a word of command, and one which ... must be given a compulsory meaning; as denoting obligation." Black's Law Dictionary 1233 (5th ed. 1979).

Revco, 898 F.2d at 500-501.

If the plain language of a statute is unambiguous, there is generally no need to look to administrative interpretations or to legislative history. Magic Restaurants, Inc. v. Bowie Produce Co. (In re Magic Restaurants, Inc.), 205 F.3d 108, 114 (3d Cir. 2000); see also Patterson v. Shumate, 504 U.S. 753, 761, 112 S.Ct. 2242, 2248 (1992); Toibb v. Radloff, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200 (1991). The term "shall" generally is mandatory and leaves no room for the exercise of discretion by the trial court. Barbieri v. RAJ Acquisition Corp. (In re Barbieri), 199 F.3d 616, 619 (2d Cir. 1999) (§ 1307(b) of the Bankruptcy Code is mandatory where statute provides that the court "shall" dismiss Chapter 13 case on request of the debtor at any time); see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 962 (1998) ("the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion"); Hall Financial Group, Inc. v. DP Partners Ltd. Partnership (In re DP Partners Ltd. Partnership), 106 F.3d 667, 670-671 (5th Cir.), cert. denied, 522 U.S. 815, 118 S.Ct. 63 (1997) (use of "shall" in § 503(b) of Bankruptcy Code connotes mandatory intent where statute provides that "there shall be allowed administrative expenses" if the requirements of the statute are met); Bell Atlantic-New Jersey, Inc. v. Tate, 962 F.Supp. 608, 616 n.6 (D. N.J. 1997) ("The word 'shall' when utilized in laws, directives, and the like, means 'must' or 'is or are obligated to'"); Williamsport Sanitary Authority v. Train, 464 F.Supp. 768, 772 n.1 (M.D. Pa. 1979) (use of word "shall" connotes a mandatory intent). There is perhaps no less ambiguous word used in statutes than "shall"; "shall" implies a command. In re Davenport, 175 B.R. 355, 358 (Bankr.

E.D. Cal.1994) (§ 1208(b) of Bankruptcy Code is mandatory where statute provides that the court "shall" dismiss Chapter 12 case on request of the debtor at any time). Where the word "shall" appears in a statutory directive, Congress could not have chosen stronger words to express its intent that an action be mandatory. Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1490 (6th Cir. 1993), aff'd, 514 U.S. 211, 115 S.Ct. 1447 (1995), citing United States v. Monsanto, 491 U.S. 600, 607, 109 S.Ct. 2657, 2662 (1989).

In Schepps Food Stores, the court closely scrutinized the plain meaning of § 1104(b)(2) (now § 1104(c)(2)) in concluding that the statute is mandatory and does not permit judicial discretion in adjudicating requests to appoint an examiner under such provision.[9]

148 B.R. a 29-30. The court stated as follows:

> ... In interpreting statutes, the court must look not only to the words of the provision, but to the relation of those words to the whole statute. [Citations omitted.] Courts look to text, context, and structure. ... Supporting the grammatical reading is the phrase's juxtaposition with the immediately proceeding section. A provision for discretionary appointment, where the court is to consider the interests of parties in making *its own determination* whether an examiner is necessary, followed by a provision that only considers whether a dollar criterion has been satisfied, is conclusive that the second provision is compelling on the court. The first clause is conditional on the court's

---

[9] A number of commentators have similarly construed § 1104(c)(2) as mandatory in effect and have rejected any court decisions interpreting the provision as discretionary. See 7 Collier on Bankruptcy ¶ 1104.03[2], at 1104-36 - 1104-38.2 (Lawrence P. King ed., 15th ed. rev. 1999) ("These lower court decisions, however, cannot withstand statutory scrutiny ... Section 1104(c)(2) does not leave any room for the court to exercise discretion about whether an examiner should be appointed, as long as the $5,000,000 threshold is met and a motion for appointment of an examiner is made by a party in interest"); Lawrence K. Snider, The Examiner in the Reorganization Process: A Need to Modify, 45 Bus. Law. 35, 41-45 (November 1989) (no justification for "disregarding the plain language" of the statute); Barry L. Zaretsky, Trustees and Examiners in Chapter 11, 44 S.C. L. Rev. 907, 937-940 (1993) ("Even when denial of a request for the appointment of an examiner appears to be in the interest of the estate, ... disregarding the clear mandatory language of section 1104(b)(2) [now 1104(c)(2)] is a disturbing example of judicial legislation ... The statute could not be more clear in mandating the appointment of an examiner under certain circumstances").

determination of interests, while the second one is conditional on the size of the debt.

Id. at 30.

Legislative History Supports Mandatory Application of § 1104(c)(2)

Although the clarity of the statutory language at issue obviates the need for inquiry as to the statute's legislative history, Patterson v. Shumate, 504 U.S. at 761, 112 S.Ct. at 2248, the legislative history of § 1104(c)(2) further supports the mandatory application of the provision. Under the Bankruptcy Act, Chapter X, which was intended to deal with larger, public company reorganizations (as opposed to Chapter XI, which was intended to deal with more limited reorganizations of smaller companies), required the appointment of a trustee in most cases, i.e., any case in which the debtor's liquidated, non-contingent debt exceeded $250,000, as part of the effort to increase control over the debtor and to protect public investors.[7] See Bankruptcy Act of 1998, § 156, 11 U.S.C. § 556 (1976) (repealed 1978); former Bankruptcy Rule 10-202.

The original Senate version of the Bankruptcy Code, S. 2266, required in § 1104(a) the appointment of a trustee in any Chapter 11 case involving a public company, defined in § 1101(3) as a debtor with outstanding liabilities of $5,000,000 or more, excluding liabilities for goods, services, or taxes, and not less than 1,000 security holders, thus addressing the concerns of the Securities and Exchange Commission.[8]

---

[7] See Zaretsky, supra note 6, at 917.

[8] Section 1101(3) in S. 2266 originally provided as follows:

> (3) "public company" shall mean a debtor who, within twelve months prior to filing a petition for relief under this chapter, had outstanding liabilities of $5,000,000 or more, exclusive of liabilities for goods, services, or taxes and not less than 1,000 security holders.

S. 2266, 95th Cong., 2d Sess., § 1101(3), reprinted in C Collier on Bankruptcy, App. Pt. 4(e), at App. Pt. 4-1849. Section 1104(a) in S. 2266 originally provided as follows:

> (a) In the case of a public company, the court, within ten days after the entry of an

/ See S. Rep. No. 95-989, 95th Cong., 2d Sess. 114-115 (1978), reprinted in D Collier on Bankruptcy, App. Pt. 4(e)(i), at App. Pt. 4-2071; see also In re Lenihan, 4 B.R. at 211. The House version, H.R. 8200, contained no provision that a trustee be appointed in a reorganization proceeding based on the liabilities of a public corporation, but rather required the court to consider the appointment of a trustee on a case-by-case basis. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 402 (1977), reprinted in C Collier on Bankruptcy, App. Pt. 4(d)(i), at App. Pt. 4-1550; see also In re Lenihan, 4 B.R. at 211. Eventually, the House and Senate reached a compromise in the final version, H.R. 8200, whereby the Senate's reference to a mandatory trustee in public company cases was eliminated and replaced with a mandatory examiner (if requested by a party in interest) in § 1104(b)(2) (now § 1104(c)(2)).[9] See 124 Cong. Rec. H 11,102 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in D Collier on Bankruptcy, App. Pt. 4(f)(i), at App. Pt. 4-2465; 124 Cong. Rec. S 17,419 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), reprinted in D Collier on Bankruptcy, App. Pt. 4(f)(iii), at App. Pt. 4-2579; see also In re Lenihan, 4 B.R. at 211. As the final remnant of the "public company" exception from S. 2266, id., § 1104(c)(2) survives as proof that Congress intended to protect constituents in larger cases by assuring that third party intervention is available in larger cases any time a party in interest desires such intervention.[10]

> order for relief under this chapter, shall appoint a disinterested trustee... [Emphasis added.]

S. 2266, 95th Cong., 2d Sess., § 1104(a), reprinted in C Collier on Bankruptcy, App. Pt. 4(e), at App. Pt. 4-1850.

[9] In the final version of the bill, the public company requirement, i.e., that the debtor have not less than 1,000 security holders, was also eliminated with respect to the mandatory appointment of an examiner, thus making such appointments applicable to all large debtors without regard to whether the debtor is a public company, so long as the unsecured debt limit is exceeded. See Snider, supra note 6, at 44.

[10] See Zaretsky, supra note 6, at 926, 940.

CONCLUSION

As set forth above, the mandatory appointment of an examiner in this case is supported by the express language of § 1104(c)(2), Revco and other applicable case law, and legislative history. Upon the application of the U.S. Trustee, and given that the unsecured debt limit is satisfied in this case, the Court is required to appoint an examiner in this case pursuant to § 1104(c)(2). For the foregoing reasons, the U.S. Trustee respectfully requests that the Court enter an order appointing an examiner in this case pursuant to 11 U.S.C. § 1104(c)(2).

DATED this 22 day of July 2002.

Respectfully submitted,

/s/ John Robert Byrnes
John Robert Byrnes
Attorney for the United States Trustee

Office of the United States Trustee
33 Whitehall Street
New York, New York 10004

212 510 0500
John Robert Byrnes, Esq.
Mary Elizabeth Tom, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____/

In re:

WORLDCOM, INC., et al.

Chapter 11
Cases No. 02-135339(AJG)

Debtors.

_____/

ORDER GRANTING THE MOTION OF THE UNITED STATES TRUSTEE FOR THE APPOINTMENT OF AN EXAMINER

THIS CAUSE came on for hearing on July 22, 2002, to consider the Motion of the United States Trustee for the Appointment of an Examiner. The Court finds that the notice given, under all the circumstances herein, is appropriate. The debtors have not objected to the order, the Court heard arguments of counsel, considered the record, and the Court is satisfied that it is appropriate to grant the Motion. Accordingly it is,

1. ORDERED, ADJUDGED and DECREED that the oral motion of the U.S. Trustee to limit and shorten notice is GRANTED. It is further

2. ORDERED, ADJUDGED and DECREED that the United States Trustee's Motion Seeking the Appointment of an Examiner is granted, and the United States Trustee is directed to appoint one examiner pursuant to 11 U.S.C. § 1104(c)(2). It is further

3. ORDERED, ADJUDGED and DECREED that the examiner shall investigate any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the arrangement of the affairs of any of the Debtors by current or former management, including but not limited to issues of accounting irregularities. In conducting

such investigation, the Examiner shall use best efforts to coordinate with, and avoid duplication of, any investigations conducted by the U.S. Department of Justice or the Securities and Exchange Commission ("SEC") or other governmental agencies. It is further

4. ORDERED, ADJUDGED and DECREED that in addition to the responsibilities set forth above, and to the extent necessary in light of the ongoing efforts of the Debtors and the corporate monitor appointed by the United District Court for the Southern District of New York, the examiner shall oversee the affairs of the Debtor to the extent necessary to preserve all records of the Debtor, regardless of their format, that may be necessary to assist the examiner in the performance of his or her duties or for any lawful investigation by any agency of state or federal government. It is further

5. ORDERED, ADJUDGED and DECREED that the Debtors and all of the Debtor's affiliates, subsidiaries and other companies under their control are directed to fully cooperate with the examiner in conjunction with the performance of any of the examiner's duties. It is further

6. ORDERED, ADJUDGED and DECREED that neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the performance of the Examiner's duties until the Examiner's report is filed with the court, except that the Examiner shall convey to the SEC and the U.S. Department of Justice any information requested by them. It is further

7. ORDERED, ADJUDGED and DECREED that the Examiner shall prepare and file the report required by 11 U.S.C. § 1106(4)(A) within 90 days of the date of appointment unless shall such time shall be extended by order of the Court. It is further

8. ORDERED, ADJUDGED and DECREED that nothing in this Order shall impede the right of the United States Trustee or any other party to request any other lawful relief, including but not limited to the expansion of the Examiner's powers or appointment of a trustee.

DONE and ORDERED this _____ day of _____, 2002.

Arthur J. Gonzales
United States Bankruptcy Judge

/s/ John Robert Byrnes
John Robert Byrnes
Attorney for the United States Trustee

Not objected to:

/s/ Marcia L. Goldstein
Marcia L. Goldstein
WEIL, GOTSHAL & MANGES LLP
Attorneys for the Debtors